Supreme Court, U.S.
FILED
MAR 2 4 2005
OFFICE OF THE CLERK

No. 03-10198

In the
Supreme Court of the
United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v

STATE OF MICHIGAN

Respondent.

On Writ of Certiorari to the
10th Judicial Circuit Court, Saginaw County, Michigan

BRIEF FOR RESPONDENT

Michael A. Cox
Michigan Attorney General

Thomas L. Casey
Michigan Solicitor General
Counsel of Record

Bernard Eric Restuccia
Assistant Attorney General
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Attorneys for Respondent

QUESTIONS PRESENTED

I. The Fourteenth Amendment guarantees an indigent defendant the right to appointed counsel for an appeal of right but does not require it for a second, discretionary appeal. In Michigan, when a defendant pleads guilty but then decides to challenge the plea or sentence, the State requires trial counsel for an indigent defendant to raise these claims in the trial court for the first review. For the second, discretionary review, Michigan does not guarantee counsel but a defendant convicted on a plea will have the record, including free transcripts, trial counsel's arguments, and the trial court's decision, to assist in preparing the application for leave to appeal to the Court of Appeals. Does the Michigan system of review of guilty-plea convictions violate the Fourteenth Amendment?

II. A defendant may waive a constitutionally-protected right if he does so voluntarily, knowingly, intelligently, and with sufficient awareness of the relevant circumstances. Here, Petitioner waived any claim to appointed appellate counsel by agreeing to plead guilty after being told that he might be appointed counsel in certain limited circumstances. Where defendant is represented by counsel at the guilty-plea proceeding, does the waiver of appointed counsel to assist in seeking discretionary appellate review violate the Fourteenth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

COURT RULES INVOLVED xiii

STATEMENT OF THE CASE 1

A. Historical Background to the Michigan System 1

B. The Michigan Review of Plea-Based Convictions 4

1. The Defendant's Plea and the First Review 4

2. The Second Review and the Application 6

C. The Cases Against Petitioner Halbert 8

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. The Michigan system of review of plea-based convictions is fair and comports with equal protection and due process because it gives indigents meaningful access to appellate review. 16

A. In Michigan, an indigent defendant who pleads guilty has the right to the assistance of counsel in bringing a challenge in the first review of the conviction. 16

1. The plea and the assistance of counsel. 16

2. The first review of plea and sentence. 17

B. The Michigan system provides counsel for the first review on the merits of a plea and sentence in the trial court, and, for a second, discretionary review, it provides uncounseled indigents with meaningful access to the appellate system that gives the appellate court an adequate basis for its decision whether to grant or deny review under *Douglas* and *Ross*. 21

1. *Douglas* does not govern discretionary review. 22

2. *Ross* governs this case. 24

3. Michigan law comports with the principles underlying *Griffin* 29

C. In Michigan, the review of an application to the Court of Appeals is *discretionary*. 31

1. The Michigan Supreme Court in *Bulger* made clear that the review of guilty-plea convictions by the Michigan Court of Appeals is discretionary. 32

2. Other case law supports this conclusion. 34

3. Petitioner's case confirms that this is discretionary review. 36

D. This Court's jurisprudence since *Ross* confirms that there is no constitutional right to appellate counsel in seeking a second, discretionary review. 38

II. A defendant may validly waive his right to the appointment of counsel on appeal where that waiver is knowing, voluntary, and intelligent. 42

A. The waiver must be knowing, voluntary, and intelligent. 42

B. The trial court's instructions were adequate to inform Petitioner of the fact that he was waiving the right to the appointment of appellate counsel in pleading guilty..... 47

C. There is nothing unfair or unequal in including a waiver of the right to appointed appellate counsel as part of an otherwise valid guilty plea. The lower federal courts have also recognized that a defendant may validly waive his right to appeal *entirely* as a condition of his plea..... 48

CONCLUSION..... 50

TABLE OF AUTHORITIES

Cases

Abela v. Martin,
380 F.3d 915 (6th Cir. 2004)..... 36

Adams v. United States ex rel. McCann,
317 U.S. 269 (1942)..... 42

Anders v. California,
386 U.S. 738 (1967)..... 38

Boykin v. Alabama,
395 U.S. 238 (1969)..... 17

Brady v. United States,
397 U.S. 742 (1970)..... 17, 42

Burns v. Ohio,
360 U.S. 252 (1959)..... 49

Coleman v. Thompson,
501 U.S. 722 (1991)..... 41

Douglas v. California,
372 U.S. 353 (1963)..... passim

Evitts v. Lucey,
469 U.S. 387 (1985)..... 17, 39, 40

Gideon v. Wainwright,
372 U.S. 335 (1963)..... 16

Great Lakes Realty Corp v. Peters,
336 Mich. 325; 57 NW 2d 901 (1953)..... 34

Griffin v. Illinois,
351 U.S. 12 (1956)..... 29, 30, 41, 49

Iowa v. Tovar,
541 U.S. 77 (2004) ..... passim

Johnson v. Zerbst,
304 U.S. 458 (1938) 42

Kercheval v. United States,
274 U.S. 220 (1927) 17

McDougal v. Schanz,
461 Mich. 15; 597 N.W.2d 148, 154 (1999) 33

McKane v. Durston,
153 U.S. 684 (1894) 21, 24

McKenzie v. Smith,
326 F.3d 721 (6th Cir. 2003), *cert denied*, 540 U.S. 1158 (2004) 36

Murray v. Giarratano,
492 U.S. 1 (1989) 39

New York v. Hill,
528 U.S. 110, (2000) 42

Pennsylvania v. Finley,
481 U.S. 551 (1987) 23, 38, 39

People v. Beasley,
198 Mich. App. 40; 497 N.W.2d 200 (1993) 18

People v. Berry,
10 Mich. App. 469; 157 N.W. 2d 310 34

People v. Bulger,
462 Mich. 495; 614 N.W.2d 103 (2000), *cert. den.*, 531 U.S. 994 (2000) ..... passim

People v. Cheseboro,
206 Mich. App. 468; 522 N.W.2d 677 (1994) 36

People v. Gazaway,
35 Mich. App. 39; 192 N.W.2d 122 (1971) 1

People v. Harris,
470 Mich. 882; 681 N.W.2d 653 (2004) 4

People v. Houston,
261 Mich. App. 463; 683 N.W.2d 192 (2004) 37

People v. Johnson,
207 Mich. App. 264; 523 N.W.2d 655 (1994) 18

People v. Kaczorowski,
190 Mich. App. 165; 475 N.W.2d 861 (1991) 18

People v. Kimble,
470 Mich. 305; 684 N.W.2d 669 (2004) 20

People v. New,
427 Mich. 482; 398 N.W.2d 358 (1986) 16

People v. Quinn,
194 Mich. App. 250; 486 N.W.2d 139 (1992) 18

Rinaldi v. Yeager,
384 U.S. 305 (1966) 29

Ross v. Moffitt,
417 U.S. 600 (1974) ..... passim

Smith v. Robbins,
528 U.S. 259 (2000) 31

State ex rel Saginaw Prosecuting Attorney v. Bobenal Invest, Inc,
111 Mich. App. 16; 314 NW 2d 512 (1981) 35

Tollett v. Henderson,
411 U.S. 267 (1973) 46

United States v. Black,
201 F.3d 1296 (10th Cir., 2000) 48, 49

United States v. Brown,
232 F.3d 399 (4th Cir. 2000) 48

United States v. Cuevas-Andrade,
232 F.3d 440 (5th Cir. 2000) 48

United States v. Fleming,
239 F.3d 761 (6th Cir. 2001) 48

United States v. Hernandez,
242 F.3d 110 (2nd Cir. 2001) 48

United States v. Howle,
166 F.3d 1166 (11th Cir. 1999) 48

United States v. Jemison,
237 F.3d 911 (7th Cir. 2001) 48

United States v. Jeronimo,
___ F.3d ___ (9th Cir. 2005) 49

United States v. MacCollum,
426 U.S. 317 (1976) 39

United States v. Mezzanatto,
513 U.S. 196 (1995) 43, 46

United States v. Michelsen,
141 F.3d 867 (8th Cir. 1998) 48

United States v. Nguyen,
235 F.3d 1179 (9th Cir. 2000) 48

United States v. Ruiz,
536 U.S. 622 (2002) 42, 47

United States v. Teeter,
257 F.3d 14 (1st Cir. 2001) 48

Statutes

MCL 750.520c(1)(a) 8

MCL 750.520c(1)(b)(i) 9

MCL 768.7b(2) 9

MCL 768.7b(2)(a) 37

MCL 769.34(10) 20

MCL 769.34(3) 11

MCL 769.8 11

MCL 769.9(2) 11

MCL 770.3(6) 4

MCL 770.3a ..... passim

MCL 770.3a(1) 7

MCL 770.3a(3) 7

MCL 770.3a(4) 7

MCL 777.1 11

MCL 777.39 36

MCL 777.57 37

MCL 800.34 12

Rules
Fed. R. Crim. Pro. 11(b)(1)(N) 48

MCR 2.119(A)(1), (2) 27

MCR 6.005(D) 16, 30

MCR 6.005(H)(4) ..... passim

MCR 6.110(A) 44

MCR 6.301(A) 16

MCR 6.301(C)(2) ..... xv, 6

MCR 6.302 ..... 9, 18, 45

MCR 6.302(B)(3) 4

MCR 6.302(B)(5) ..... xiv, 4

MCR 6.302(B)(6) ..... xiv, 4, 6

MCR 6.310(B) 4

MCR 6.311 ..... 27, 40

MCR 6.311(A) 5, 26

MCR 6.311(B) 5

MCR 6.311(C) 5, 18, 19, 30

MCR 6.425(E)(2)(d) 12

MCR 6.429 ..... 27, 40

MCR 6.429(B)(3) 5

MCR 6.429(C) 5, 19, 20, 30

MCR 6.433 27

MCR 6.500(H) xiv

MCR 6.508(D) 36

MCR 7.203(A)(1)(b) 4

MCR 7.204(C)(2) 8

MCR 7.205 ..... 6, 34

MCR 7.205(A) and (F) 7

MCR 7.205(B)(4)(d) 8

MCR 7.205(B)(4)(g) 8

MCR 7.205(F) 5, 26

MCR 7.215(B) 34

MCR 7.215(C) 34

MCR 7.215(C)(1) 35

MCR 7.215(E)(1) 34

Constitutional Provisions
Const. 1963, art 1, §20 1

Const. 1963, art 6, §5 33

Other Authorities
7 Michigan Bar Journal 906, 910 (September, 1993) 2

73 U. Det. Mercy L. Rev. 431 (1996) 3

Citizens Research Council of Michigan, "Statewide Ballot Proposals," No. 1033, October 1994 2

House Legislative Analysis, Ballot Proposal B, First Analysis, filed October 14, 1994 2

Michigan Lawyers Weekly, Vol. 7, No. 15, February 22, 1993 3

COURT RULES INVOLVED

In addition to the constitutional provision and statute quoted at Petitioner's brief, pp 1-4, the following Michigan Court Rules (MCR) are pertinent:

MCR 6.500(H):

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer appointed to represent the defendant include

(1) representing the defendant in all trial court proceedings including sentencing and proceedings leading to possible revocation of youthful trainee status,

(2) filing of interlocutory appeals the lawyer deems appropriate,

(3) responding to any preconviction appeals by the prosecutor, and

(4) unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

MCR 6.302(B)(5), (6):

(B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

* * *

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and

(a) the defendant's sentence exceeds the guidelines,

(b) the plea is a conditional plea under MCR 6.301(C)(2),

(c) the prosecuting attorney seeks leave to appeal, or

(d) the Court of Appeals or the Supreme Court grants leave to appeal.

STATEMENT OF THE CASE

A. Historical Background to the Michigan System

Before 1994, the Michigan Constitution provided defendants an appeal of right from all criminal convictions without distinguishing between convictions by jury trials and guilty pleas. Mich. Const. 1963, art 1, §20. Under Michigan case law, the courts then held that an indigent defendant had the right to the appointment of appellate counsel for an appeal of right. *People v. Gazaway,* 35 Mich. App. 39, 40-41; 192 N.W.2d 122 (1971), citing *Douglas v. California,* 372 U.S. 353 (1963).

In 1994, the people of Michigan adopted a proposal to amend the Constitution, known as "Proposal B," that eliminated appeals by right in plea-based convictions, and instead required a defendant to file an application for leave. As amended in Const. 1963, art 1, §20, the Michigan Constitution now states that an accused is entitled "to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court[.]"

In *People v. Bulger,* 462 Mich. 495, 504; 614 N.W.2d 103 (2000), *cert. den.*, 531 U.S. 994 (2000), the Michigan Supreme Court explained that one of the primary reasons for the adoption of the 1994 amendment was to alleviate the court's backlog:

> Eliminating appeals as a matter of right from plea-based convictions was suggested as a way to help control the case load of the Michigan Court of Appeals. By 1992, the Court of Appeals had a backlog of more than *4,000 cases awaiting decision*, and plea-based appeals constituted approximately *thirty percent of all appeals facing the Michigan*

> *Court of Appeals*. Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts. [Citations and internal quotation marks omitted; emphasis added.]

By eliminating the appeal by right, the amendment thereby might reduce the number of cases filed from plea-based convictions.

Before the passage of the 1994 amendment, appeals from plea-based convictions in Michigan comprised a substantial portion of the total cases filed in the Michigan Court of Appeals. In 1992, there were a total of 13,300 filings for all cases, including appeals by right and by application, both civil and criminal, in the Michigan Court of Appeals.[1] Of these cases, approximately 4000 of the filings each year were appeals from guilty-plea cases, comprising two-thirds of all criminal appellate cases.[2] At the time, it took a case approximately two and a half years to reach disposition.[3]

One of the other considerations at play in eliminating a defendant's appeal by right was the futility of these appeals that were generally with appointed counsel. See House Legislative Analysis, Ballot Proposal B, First Analysis, filed October 14, 1994, p 4. Consistent with this, the Chief Judge of the Michigan Court of Appeals at the time, Judge William Murphy, reported that only 0.74 percent of guilty-plea cases tracked in 1992 were reversed (12 out of 1,629) and that 9.5

[1] See "'Structural Deficit' as it Relates to the Crisis in the Michigan Court of Appeals," 7 Michigan Bar Journal 906, 910 (September, 1993).

[2] See House Legislative Analysis, Ballot Proposal B, First Analysis, filed October 14, 1994, p 2.

[3] See Citizens Research Council of Michigan, "Statewide Ballot Proposals," No. 1033, October 1994, p 1.

percent were remanded for further sentencing actions. *Michigan Lawyers Weekly*, Vol. 7, No. 15, February 22, 1993, p 20.[4]

Once the 1994 amendment made plea-based appeals a matter of discretionary application for leave, the Michigan Supreme Court revised the court rules to authorize trial courts to "liberally grant" the appointment of counsel for indigent defendants who filed an application within 42 days of sentencing. *Bulger, supra,* 462 Mich. at 501. This court rule was challenged in *Bulger*, and the Michigan Supreme Court provided a lengthy analysis affirming the constitutionality of the system. See *Bulger, supra.*

In 2000, while *Bulger* was pending, the Legislature passed MCL 770.3a, which provides the current system of appointment of appellate counsel for defendants who plead guilty and then decide to challenge either the conviction or the

[4] In his brief, Petitioner cites the figures that between 12 and 47 percent of defendants received relief in these plea-based appeals and he cites a law student note, "Limiting Michigan's Guilty and Nolo Contendere Plea Appeals," 73 U. Det. Mercy L. Rev. 431, 443 (1996). Petitioner's brief, p 42. The note obtained these figures, however, from the October 14, 1994 legislative analysis, which merely reported claims from the State Appellate Assigned Counsel System ("12 to 13 percent") and from the State Appellate Defender's Office (SADO) ("about 47 percent"). See 73 U. Det. Mercy L. Rev. at 443, n 113, citing House Legislative Analysis at 3. Significantly, this analysis also reported that "the [C]ourt of [A]ppeals estimates that the relief rate on guilty plea cases that actually come before it is relatively low, perhaps three or four percent." *Id.* at 4. It explained that "relief" did not necessarily mean that the defendant would serve a lesser sentence:

> Further, that relief may take the form of requiring the trial court to resentence the defendant, with variable results; sometimes the sentence is the same, sometimes it is longer, sometimes the defendant's sentence is reduced by only a few days. [*Id.*]

Respondent submits that the Michigan Court of Appeals is the proper source for information in this area, not the defender's office.

sentence. This statute took effect on April 1, 2000 and is the statute that is at issue in this case.[5]

B. The Michigan Review of Plea-Based Convictions

1. The Defendant's Plea and the First Review

Michigan has a two-tier appellate court system, consisting of the intermediate Michigan Court of Appeals and the Michigan Supreme Court. All appeals to the Michigan Supreme Court are by application. See MCL 770.3(6). In criminal cases, the Michigan Court of Appeals reviews appeals by right from all final judgments from the circuit court ("the trial court"), except in cases in which the conviction is based on a plea of guilty or nolo contendere, which are by leave. MCR 7.203(A)(1)(b). All appeals from guilty-plea cases are by application. *Bulger, supra,* 462 Mich. at 505.

In the plea proceeding, the trial court is required by the Michigan court rules to inform the defendant of all of the rights that the defendant is waiving by his plea. MCR 6.302(B)(3). In addition to the standard rights, the court is also obligated to inform the defendant that the plea waives any right to have the Court of Appeals hear any appeal from the conviction and sentence, but rather, that any appeal would be by application. MCR 6.302(B)(5). The court is also required to inform the defendant that he will only have the right to the assistance of counsel on appeal in certain circumstances, listed in MCR 6.302(B)(6)(a), (b), (c), and (d).

Before sentencing, a defendant has a right to move to withdraw a plea, and the trial court "in the interest of justice may permit an accepted plea to be withdrawn[.]" MCR 6.310(B). After sentencing, however, the court rules provide

---

[5] The Michigan Supreme Court determined that the statute was constitutional relying on the *Bulger* decision. *People v. Harris,* 470 Mich. 882; 681 N.W.2d 653 (2004), pet. for cert. pending, No. 04-6572.

that the trial court may only set aside the plea and sentence where it "determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside[.]" MCR 6.311(B).

Where a defendant wishes to challenge the validity of a plea after sentencing, the court rules require that the defendant first raise this issue before the trial court. See MCR 6.311(C). Thus, where a defendant is challenging the validity of the adjudication of guilt, the first review of the conviction's validity must occur in the trial court.

For this first review, the Michigan system requires trial counsel to serve as the defendant's counsel for raising this issue the first time where appellate counsel has not been assigned. See MCR 6.005(H)(4).

Similarly, the Michigan system instructs a defendant to first raise issues regarding sentencing before the trial court. If the defendant believes that the trial court has wrongly scored one of the variables in calculating the guidelines or relied on inaccurate information, the defendant generally must raise this issue before the sentencing court. See MCR 6.429(C). Like motions to withdraw a plea, a defendant's trial counsel has the responsibility to object at sentencing to an improper scoring of the guidelines and, where appellate counsel has not been assigned, to bring a post-conviction motion for resentencing for any errors that he failed to raise at sentencing. MCR 6.005(H)(4).

Under the court rules, a defendant may file a motion to withdraw his plea within the time for filing an application for leave, which is one year. See MCR 6.311(A); MCR 7.205(F)(4). The rules provide the same time framework – one year – for a motion for resentencing. MCR 6.429(B)(3).

2. The Second Review and the Application

The Michigan Supreme Court has expressly stated that the application for leave in the Court of Appeals is a *discretionary* one. *Bulger, supra,* 462 Mich. at 499. The requirements for filing an application for leave to appeal to the Michigan Court of Appeals are set forth in MCR 7.205.

By statute, the Legislature has defined the circumstances in which the State of Michigan shall appoint appellate counsel for an indigent defendant who pleads guilty, nolo contendere, or guilty but mentally ill and wishes to bring an application for leave to the Michigan Court of Appeals.[6] Under MCL 770.3a, there are four circumstances in which a defendant has the right to the appointment of appellate counsel:

(1) the prosecuting attorney seeks leave;

(2) the defendant's sentence exceeds the upper limit of the minimum sentence range of the guidelines;

(3) there is a grant of the defendant's application for leave;

(4) the defendant seeks to appeal a conditional plea under the Michigan Court Rule 6.301(C)(2).[7]

This provision corresponds to the court rules at MCR 6.302(B)(6). The statute also provides the trial court the discretion to appoint counsel in another situation – where the defendant alleges an error in an offense variable or prior record

[6] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For ease of reference, this brief will use the term "guilty plea" to apply to all three types of convictions.

[7] The court and the prosecutor must agree to a conditional plea under MCR 6.301(C)(2) for pretrial rulings; such a plea allows the defendant to withdraw the plea if the trial court's decision is overturned on appeal.

variable, counsel objected, and the sentence would be an upward departure if the defendant was right on how to score the contested variable. MCL 770.3a(3).

Outside of these circumstances, the statute provides that a defendant who pleads guilty "shall not have appellate counsel appointed for review of the defendant's conviction or sentence." MCL 770.3a(1).

Where an indigent defendant seeks to have the Michigan Court of Appeals review his conviction or sentence, Michigan law requires the trial court to provide the defendant with two forms developed by the State Court Administrative Office, MCL 770.3a(4): (1) an advice of right to appeal form, again outlining the circumstances in which the defendant has the right to appointed counsel; and (2) the application instructions, which include two pages of common-sense directions on how to fill out the application, and the application itself, which runs four pages.[8] The application provides, in a practical way, all of the steps that a defendant needs to follow to file an application for leave.

In bringing an application for leave to the Michigan Court of Appeals, the court rules provide that a defendant must file within 21 days of the trial court's final order – the judgment of sentence – but a defendant may file up to one year after the final order as a delayed application with an explanation of the reasons for the delay. MCR 7.205(A) and (F). The current form assumes the application will be a delayed application and begins with the statement that the application is filed more than

[8] Both of these forms may be found on the Michigan court website at the following address: http://courts.michigan.gov/scao/courtforms/appeals/appendex.htm ("Advice Concerning Right to Appeal After Plea of Guilty/ Nolo Contendere" and "Application for Leave to Appeal After Sentencing on Plea of Guilty or Nolo Contendere"). These forms were both revised in 2003 and 2004 after Petitioner's case. The corresponding forms used for Petitioner's case were earlier versions. See J.A. 46-50, 53-57, 66-71.

21 days from the judgment of sentence, followed by a list of possible standard explanations for the delay for the defendant to check off.[9]

For a timely filing of an application, the rules require that the defendant attach a copy of the plea transcript and the sentencing transcript, MCR 7.205(B)(4)(d), but if these have not yet been prepared, the rules allow the defendant to file a copy of the certificate of the court reporter. MCR 7.205(B)(4)(g) and MCR 7.204(C)(2). The application instruction form alleviates the need for the defendant to wade through the court rules – the form explains that the defendant must file the plea and sentencing transcripts but "[i]f the transcripts are not available when you file your application, substitute it with the request letter to the circuit court."[10] There is no filing fee for an indigent's application for leave, but the indigent defendant is responsible for filing an affidavit of indigency.[11]

C. The Cases Against Petitioner Halbert

Petitioner was charged in Saginaw County, Michigan with three counts of second-degree criminal sexual conduct against three different victims, between April and June 2000. J.A. 8-11, Case No. 00-19193 (the "first case"). In the first and third counts, Petitioner was charged with sexually touching a girl younger than 13 years old: one victim was 10 years old and the other was only 6 years old. MCL 750.520c(1)(a) (victim

[9] The standard reasons listed in the application included "I did not know until recently that I could appeal the decision," "I could not afford the postage and copying costs to file this application," and "I needed to get help to complete this application." "Application for Leave to Appeal," p 1. The Petitioner's form is identical on this point. See J.A. 66-67.

[10] "Application for Leave," p 2 of instructions.

[11] *Id.*

under 13 years old). In the second count, defendant was charged with sexually touching his stepdaughter, who was 13 years old, when she was a member of his household. MCL 750.520c(1)(b)(i) (victim between 13 and 16 and member of same household). When Petitioner was released on bond in December 2000, the court imposed as a condition of bond that he not reside at the same residence as his stepdaughter.

In July 2001, seven months later, Petitioner again sexually touched his stepdaughter and was charged in Saginaw County in a second case with one count of second-degree criminal sexual conduct. MCL 750.520c(1)(b)(i). J.A. 14-16, Case No. 01-20597 (the "second case").

Petitioner remained in custody and was represented by retained counsel in the trial court proceedings on both cases.

On November 7, 2001, Petitioner entered pleas of nolo contendere to Count I of the first case and to the only count in the second case.[12] In exchange, the prosecutor agreed to dismiss the second and third counts of the first case and recommended that Petitioner be sentenced within the Michigan Sentencing Guidelines. The prosecutor also requested that the court impose consecutive sentencing.[13] Petitioner's trial counsel noted for the record that he had discussed the plea agreement with Petitioner and Petitioner understood it. Trial counsel also requested concurrent sentencing. J.A. 17-19.

As required by MCR 6.302, the trial court asked Petitioner a series of questions to ensure that the pleas were

[12] Petitioner entered pleas of nolo contendere rather than guilty because of the potential for civil liability in a pending neglect petition involving his stepdaughter. J.A. 18.

[13] Because the second offense was committed while the first charges were pending, the trial court had discretion to impose consecutive sentencing. MCL 768.7b(2).

"understanding, voluntary, and accurate." The court informed Petitioner of the list of rights he would be giving up by pleading instead of going to trial, including the right to appeal and the right to appointed appellate counsel:

> THE COURT: You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right.
>
> THE DEFENDANT: Yes, sir.
>
> * * *
>
> THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. *Under those conditions I must appoint an attorney, do you understand that*?
>
> THE DEFENDANT: *Yes, sir.*
>
> THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. *Under those conditions I may appoint an attorney for you, do you understand that?*

> THE DEFENDANT: *Yes, sir.* [J.A. 22-23 (emphasis added).]

The court then referred the matter to the Department of Corrections for a presentencing investigation.

In Michigan, for each case, the Department of Corrections prepares a sentence investigation report. This report includes a recommended calculation of the guidelines for each case. J.A. 27-28, 29-30. Under Michigan's sentencing scheme, the maximum sentences are set by statute and the minimum sentence ranges are determined by using the sentencing guidelines.[14] Consequently, it is an indeterminate sentencing system. See MCL 769.8. The trial court is required to sentence a defendant within the guideline range for the minimum sentence, but may "depart" from the guidelines if there are substantial and compelling reasons for doing so. MCL 769.34(3).

Here, the two cases of criminal sexual conduct were subject to a maximum sentence of 15 years set by statute. See MCL 769.9(2). The guidelines governing the minimum sentence consider both a defendant's past criminal record, which is measured by prior offense variables (PRV), and the gravity of the offense, which is determined by the offense variables (OV). Each variable is totaled and then compared to a grid based on the crime group (here, crimes against a person) and crime classes (here, class C). Michigan Sentencing Guidelines Manual, 2001 Edition, pp 3-5; App. to Respondent's Brief in Opp. to Pet., 32b-34b.

At sentencing, on December 10, 2001, Petitioner's retained counsel acknowledged that he and Petitioner had discussed the

---

[14] The Michigan sentencing guidelines are governed by statute, MCL 777.1 *et seq*. The Michigan Supreme Court has promulgated a guideline manual, the current version of which can be found on the Michigan court website: http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

presentencing report the previous week. J.A. 32. Neither the defense nor the prosecution objected to the scoring of the guidelines, although Petitioner's trial counsel asked the court to sentence Petitioner concurrently. J.A. 33. The trial court decided to sentence Petitioner within the guidelines on each offense – at the highest end – and made the sentences consecutive: Petitioner was sentenced to 2-to-15 years in prison on the first case to run consecutive with his 57-months-to-15 years on the second case. J.A. 35. Under Michigan Truth-In-Sentencing law, Petitioner will not be eligible for parole release until he has served the combined minimum terms of 81 months. See MCL 800.34(5).

Consistent with the Michigan court rules under MCR 6.425(E)(2)(d), Petitioner was given a form entitled "Notice of Rights After Sentencing (after Plea of Guilty/Nolo Contendere) and Request for Appointment of Attorney" for each of his cases. On December 12, 2001, he signed and filed these forms requesting appointment of an appellate attorney for each case. J.A. 46-50, 53-57. Petitioner also signed the receipt of notice of appeal rights and form for the application for leave to appeal. On December 21, 2001, in separate orders, the trial court denied his request for the appointment of an attorney. J.A. 44-45, 51-52.

On December 17, 2001, according to the docket entries, defendant moved to withdraw his plea. J.A. 5. On December 18, 2001, the trial court denied this motion, reasoning that "there was no agreement as to if the sentences were to run concurrent or consecutive." J.A. 43.

On September 11, 2002, Petitioner filed a motion requesting appointment of counsel, an evidentiary hearing, and resentencing on both cases. J.A. 60-63. On October 25, 2002, the trial court again denied a motion for appointed appellate counsel, citing *Bulger, supra.* J.A. 64-65.

On November 5, 2002, Petitioner filed a pro se application for leave to appeal to the Michigan Court of Appeals on a form provided by the State Court Administrative Office. This application challenged the scoring of the sentencing guidelines and alleged ineffective assistance of trial counsel regarding the guidelines. J.A. 66-71.[15] On January 13, 2003, the Michigan Court of Appeals denied Petitioner's delayed pro se application for leave to appeal "for lack of merit in the grounds presented." J.A. 72.

On February 25, 2003, Petitioner filed a pro se application for leave to appeal to the Michigan Supreme Court on a form provided by Prison Legal Services of Michigan. J.A. 73-83. This application challenged the scoring of the sentencing guidelines, alleged ineffective assistance of trial counsel on the guideline scoring, and raised the issue of the trial court's failure to appoint appellate counsel. On September 19, 2003, the Michigan Supreme Court denied Petitioner's pro se application for leave to appeal. J.A. 84-85.

On November 20, 2003, Petitioner filed a pro se petition seeking a writ of certiorari that was granted on January 7, 2005. On February 14, 2005, Petitioner filed his brief with the assistance of an appellate counsel appointed by this Court.

---

[15] The application included two explanatory pages on how to fill out the application. These pages are not appended – they would not have been filed with the application. The Supreme Court Administrative Office's version of the form used here is virtually identical to the one currently available on its website. See n. 9, *supra.*

SUMMARY OF ARGUMENT

The Michigan system for review of guilty-plea convictions satisfies constitutional requirements. In the Michigan system, the first review of a defendant's plea-based conviction occurs in the trial court, which must ensure the fairness and validity of the plea and sentence. The defendant is guaranteed the assistance of counsel for this first review. Michigan then limits a defendant's right to a second review, requiring the defendant to seek leave in the Michigan Court of Appeals by filing an application. This is a discretionary matter for the Court of Appeals – there is no right to have the matter examined on the merits.

The distinction Michigan law makes between appeals from guilty-plea convictions and from convictions from trial is based on reasoned distinctions inherent in guilty-plea convictions – these distinctions recognize that ordinarily the number and complexity of the possible claims of error are limited and that a defendant has already had one review when challenging the plea or sentence. Moreover, the requirement that a defendant must raise plea and sentencing issues in the trial court also ensures that an indigent defendant will have an adequate record from which to present his claims adequately in seeking a second review. The system is fair.

Petitioner's case confirms the fairness of the Michigan system. With the assistance of his retained attorney, Petitioner Halbert pleaded nolo contendere in two different criminal sexual conduct cases. J.A. 18-25. After the trial court imposed consecutive sentencing, defendant sought to withdraw his plea, apparently claiming that he was promised concurrent sentencing. In response, the court noted that there was no agreement to have the sentences run concurrently. J.A. 43. After being denied the appointment of appellate counsel, Petitioner then sought the further assistance of trial counsel as envisioned by the court rules. The trial counsel declined to

assist because he knew that there was no merit to the claim that Petitioner expected to have concurrent sentences.

The Michigan system is also constitutional because Petitioner validly waived any claim to the appointment of appellate counsel at the plea. Regardless whether there is a right to appellate counsel in this circumstance, Petitioner waived this claim when he pleaded guilty. This Court has recognized the ability of a defendant to waive his constitutional rights – including the right to counsel – as long as the waiver was knowing, intelligent, and done with sufficient awareness of the relevant circumstances. Petitioner did so here.

In fact, this case compares favorably to the facts of *Iowa v. Tovar*, 541 U.S. 77 (2004), in which this Court affirmed the validity of a waiver of the right to counsel at an arraignment even though the defendant had not previously conferred with an attorney. Here, with the assistance of a retained attorney, Petitioner pleaded guilty and waived any claim to the assistance of appellate counsel in bringing an application if he later wanted to challenge the validity of the conviction or sentence. The right to have legal assistance where the possible defenses were entirely open in *Tovar* was of greater value to the defendant there than it was for Petitioner here, who waived his claim for possible later appellate assistance only after his retained attorney had negotiated a plea agreement with a sentencing agreement.

ARGUMENT

I. The Michigan system of review of plea-based convictions is fair and comports with equal protection and due process because it gives indigents meaningful access to appellate review.

A. In Michigan, an indigent defendant who pleads guilty has the right to the assistance of counsel in bringing a challenge in the first review of the conviction.

In Michigan, as in all states, the vast majority of criminal cases are resolved by plea. See Michigan Supreme Court 2003 Annual Report, Circuit Court Statistical Supplement at 3 (94%).[16] The State of Michigan limits the right to bring an appeal from these convictions and limits the right to the appointment of counsel to assist in filing these applications for discretionary review based on the nature of Michigan's review of convictions from plea proceedings and the kinds of challenges that can be brought.

1. The plea and the assistance of counsel.

Under the Michigan system of review, an indigent defendant charged with a crime has a right to the appointment of counsel to assist in his defense. MCR 6.005(D). This right is also required under the Fourteenth and Sixth Amendments. *Gideon v. Wainwright,* 372 U.S. 335 (1963). A defendant also has the right to plead guilty to the charged offenses. See MCR 6.301(A).[17]

---

[16] This report may be found on the Michigan court website: http://courts.michigan.gov/scao/resources/publications/statistics/2003/circuitcaseloadreport2003.pdf.

[17] Under Michigan law, a plea of nolo contendere operates the same as guilty plea except on the method by which the factual basis is established. *People v. New*, 427 Mich. 482, 493; 398 N.W.2d 358 (1986).

A defendant's plea of guilty to the charged offense operates as a dramatic change in the nature of the proceedings against him. The plea is the conviction itself. *Boykin v. Alabama,* 395 U.S. 238, 242 (1969). See also *Kercheval v. United States,* 274 U.S. 220, 223 (1927). All that is left is for the trial court to do is to pass judgment and sentence. *Boykin, supra,* 395 U.S. at 242. Convictions by guilty pleas are advantageous to both defendants and the government, and are a major aspect of the criminal justice system. *Brady v. United States*, 397 U.S. 742, 752 (1970).

In pleading guilty, the defendant substantially reduces the number of challenges that he can make to his conviction. In *Bulger, supra,* 462 Mich. at 517, n 7, the Michigan Supreme Court listed a number of different claims under Michigan law that are waived by a plea of guilty, including the following:

- claims of error from the preliminary examination including sufficiency for a bind over;
- compulsory incrimination claims;
- nonjurisdiction evidentiary issues; and
- claims regarding the ability of the prosecutor to prove the case.

Convictions from guilty pleas in Michigan are, in a very real sense, "the final step in the adjudication of guilt or innocence of the individual." *Evitts v. Lucey*, 469 U.S. 387, 404 (1985).

2. The first review of plea and sentence.

Under Michigan law, all of the claims that the plea was not understanding, voluntary, or accurate must be raised for the first time in a motion to set aside the plea at the trial court

before they can be raised in an application in the Court of Appeals. MCR 6.311(C):

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter or any other claim that this plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

In other words, where a defendant challenges the validity of the adjudication of guilt, the first review of the conviction's validity must occur before the trial court. The Michigan Court of Appeals has generally been strict in enforcing this rule. See, e.g., *People v. Beasley,* 198 Mich. App. 40, 42-43; 497 N.W.2d 200 (1993).[18]

For this first review of the validity of the conviction, the Michigan system requires trial counsel to serve as the defendant's counsel for raising this issue. MCR 6.005(H)(4)

---

[18] In *Beasley,* the Michigan Court of Appeals evaluated a claim that defendant's plea was factually inadequate to establish the elements of the crime. It determined that the defendant had "waived" this issue on appeal without evaluating the merits because the defendant did not move to withdraw his plea in the trial court. *Beasley, supra,* 198 Mich. App. at 42-43 ("because defendant failed to move to withdraw his plea in the trial court, this issue is waived on appeal"). See also, e.g., *People v. Kaczorowski,* 190 Mich. App. 165, 172-173; 475 N.W.2d 861, 864-865 (1991).

The Michigan Court of Appeals has recognized exceptions to this general rule, for example, where the trial court "completely fails to inform the defendant on the record of any of the rights enumerated in MCR 6.302," see *People v. Quinn,* 194 Mich. App. 250, 254; 486 N.W.2d 139 (1992), or where the defect is jurisdictional, see *People v. Johnson,* 207 Mich. App. 264, 264; 523 N.W.2d 655 (1994).

provides that the trial counsel is responsible for raising the motion to withdraw a defendant's plea:

> The responsibilities of the trial lawyer appointed to represent the defendant include
>
> * * *
>
> (4) unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

The Michigan Supreme Court explained the same point that issues related to the validity of the plea must be raised in the trial court and that the trial counsel is responsible for assisting in raising these post-conviction motions:

> Claims of failures to honor plea bargains, coercion or involuntariness of a plea, and lack of mental capacity to enter a plea are all examples of issues that require preservation by a motion to withdraw under MCR 6.311(C). A defendant will accordingly have assistance of appointed trial counsel in identifying and raising those issues worth preserving. MCR 6.005(H)(4). [*Bulger, supra,* 462 Mich. at 518, n. 8.]

Similarly, the Michigan system requires that challenges to the scoring of sentencing guidelines be raised and resolved at sentencing. MCR 6.429(C). This rule provides that sentences within the guidelines must be challenged before the trial court:

> A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon

> in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. [MCR 6.429(C).][19]

Just as in motions to withdraw pleas, trial counsel has the responsibility to object at sentencing to an improper scoring of the guidelines and, if counsel fails to do so, to move for resentencing for any errors that he failed to raise at sentencing. MCR 6.005(H)(4) (the postconviction motions include "motions . . . for resentencing").

Based on these court rules, the Michigan Supreme Court explained in *Bulger* that the Michigan system places the obligation on trial counsel of raising these issues for their first review in the trial court:

> Thus, our court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation. [*Bulger, supra,* 462 Mich. at 518.]

For this reason, it is the responsibility of trial counsel to file any appropriate postconviction motions. *Id.* In effect, Michigan places this essentially review function on trial counsel.

---

[19] As an exception to this general rule, the Michigan Supreme Court has allowed review under MCL 769.34(10) where a defendant raises a sentencing issue for the first time on appeal when the guidelines, if scored as the defendant alleged, would make the trial court's sentence a departure. See *People v. Kimble,* 470 Mich. 305, 310; 684 N.W.2d 669, 672 (2004). Otherwise, a sentencing claim on scoring issues is not reviewable unless the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. *Id.*

Petitioner's case reflects this point. In response to Petitioner's request for assistance to his retained trial counsel, Rod O'Farrell sent Petitioner a letter dated May 21, 2002 in which he explained that he was unable to assist Petitioner because the positions that Petitioner was advancing on the issue of concurrent and consecutive sentences were "contradictory to our discussions and also to the record." Petition, Exhibit H. As this Court noted in *Smith v. Robbins,* 528 U.S. 259, 278 (2000), Petitioner's retained attorney had no obligation to raise a frivolous motion. ("For although, under *Douglas,* indigents generally have a right to counsel on a first appeal as of right, it is equally true that this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal").

B. The Michigan system provides counsel for the first review on the merits of a plea and sentence in the trial court, and, for a second, discretionary review, it provides uncounseled indigents with meaningful access to the appellate system that gives the appellate court an adequate basis for its decision whether to grant or deny review under *Douglas* and *Ross*.

As a threshold matter, it is clear there is no constitutional right to an appeal, *McKane v. Durston*, 153 U.S. 684, 687 (1894). Nevertheless, where a State grants a defendant a first appeal as of right on the merits, then the State cannot deny appointing counsel to an indigent defendant. *Douglas v. California*, 372 U.S. 353, 357 (1963). The Michigan system provides an indigent defendant with the assistance of counsel to raise claims that relate to his adjudication of guilt and sentence in the first review in the trial court. This process ensures there will be a sufficient record to enable him meaningful access to a second, discretionary review in the Michigan Court of Appeals in accordance with *Douglas* and

Ross, and to ensure that the appellate court has an adequate basis for its discretionary decision whether to grant or deny leave.

1. *Douglas* does not govern discretionary review.

In the California system under review in *Douglas*, an indigent defendant had an appeal by right but had to ask the court to appoint counsel. The California courts would then determine whether counsel would be "of advantage to the defendant or helpful to the appellate court" and, after this preliminary determination, decide whether to appoint counsel. *Douglas, supra*, 372 U.S. at 355. This Court determined that such a system was both unfair and unequal:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. [*Id.* at 357-358.]

Without the assistance of counsel, this Court concluded "the indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Id.*

The essential element of this Court's holding in *Douglas* was based on the fact that the "preliminary determination" by the California court evaluated the merits of the defendant's appeal:

> If [the indigent defendant can afford the assistance of counsel], the appellate court passes on the merits of his case only after having the full benefit of written

> briefs and oral argument by counsel. If he cannot the appellate court is forced to *prejudge the merits* before it can even determine whether counsel should be provided. [*Douglas, supra*, 372 U.S. at 356 (emphasis added).]

This Court limited its holding to the circumstance where "the merits of the one and only appeal an indigent has of right are decided without the benefit of counsel." *Id.* at 357. Consequently, the *Douglas* opinion does not govern the Michigan appellate system, which only provides a defendant an opportunity to file an application for *discretionary* review by the Michigan Court of Appeals. There is no right to have the merits reviewed in an appeal from a plea-based conviction in Michigan. See section C, *infra*.

In subsequently explaining *Douglas* in *Ross v. Moffitt*, 417 U.S. 600, 608 (1974), this Court repeated the point that the review was of a first appeal in which the merits of defendant's claims were examined – this was an indispensable part of the analysis in *Douglas*. In explaining this point in *Ross*, this Court stated, 417 U.S. at 608:

> The Court [in *Douglas*] noted that under this system an indigent's case was initially reviewed on the merits without the benefit of any organization or argument by counsel. ... The Court noted, however, that its decision *extended only to initial appeals as of right* . . . . [emphasis added]

This Court has never extended this holding in *Douglas* to a discretionary review. The right to counsel on appeal "extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). There is no reason to extend this holding here where Michigan provides indigent defendants meaningful access to the appellate system.

2. *Ross* governs this case.

This Court held in *Ross* that there is no constitutional right to the appointment of counsel for an indigent defendant in a second, discretionary appeal where that defendant has "meaningful access" to the next level of review. *Ross, supra,* 417 U.S. at 615. The fact that a defendant is seeking review is significant to the determination, because no longer is the defendant attempting to defend himself from the prosecution, but now is endeavoring to upset a prior determination of guilt:

> [I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. *The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.* This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. [*Ross, supra,* 417 U.S. at 610-611 (emphasis added), citing *McKane v. Durston, supra.*]

The Michigan process of review for plea-based convictions has been located in the trial court as the first step. Consequently, where a defendant has pleaded guilty and then decides that his plea was improper, he approaches this first review as a convicted person using his assistance of counsel as a sword, not as a shield.

In *Ross,* this Court explained the nature of the due process claim from *Douglas.* This Court noted that *Douglas* stated that it was unfair to require a defendant to make the initial showing

of the merits of his claim for an ex parte review by the appellate court without the assistance of counsel: "'When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.'" *Ross, supra,* 417 U.S. at 609, quoting *Douglas, supra,* 372 U.S. at 357. *Ross* then went on to clarify this point that a process is unfair where the defendant is denied "meaningful access" to the appellate system:

> Unfairness results only if indigents are singled out by the State and *denied meaningful access to the appellate system* because of their poverty. [*Ross, supra,* 417 U.S. at 611 (emphasis added).]

By requiring that the first review occur in the trial court, however, Michigan assures that all the tools necessary for a meaningful application to the Michigan Court of Appeals are available. This Court in *Ross* explained what tools are necessary for an adequate review on appeal:

> At that stage [in bringing an application for leave in the North Carolina Supreme Court] he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review. [*Id.* at 615.]

These three items, (1) a transcript, (2) an argument setting forth his claims of error, and (3) an opinion, will also be present for a defendant in Michigan. Even if trial counsel raises arguments orally on the record, instead of in a written brief,

there will be a transcript so the defendant will have sufficient tools to bring an application for leave in Michigan.

The dissenting opinion in *Bulger* provided an apt description of what the Michigan system requires of the trial counsel:

> Accordingly, construing the rules in such a fashion [as the majority opinion in *Bulger*] that trial counsel would become the only standard-bearer for postconviction motions would entail an extension of the defendant-trial counsel relationship. The traditional end of that relationship was the appointment of appellate counsel, usually following and pursuant to the defendant's execution of the State Court Administrator's Office form given to defendant at sentencing.
>
> However, the majority's decision would extend this relationship for a time, matching the time for filing an application for leave to appeal, which is, under MCR 6.311(A), the time when a defendant may file a motion to withdraw a plea. Given the various scenarios possible under MCR 7.205(F) for filing a delayed application for leave to appeal, a defendant-trial counsel relationship could last up to, and in some cases beyond, twelve months following sentencing. [*Bulger*, *supra*, 462 Mich. at 572 (Cavanagh, dissenting) (paragraph break added).]

In requiring that the trial counsel continue to represent a defendant even after the conviction and sentence is complete under MCR 6.005(H)(4), the Michigan system provides a defendant counsel to create the record necessary to bring an application for leave where the trial court has rejected the effort to set aside the plea or has rejected the sentencing claim. Because trial counsel must move to set aside the plea under

MCR 6.311 or object to the sentencing under MCR 6.429, at the very least, there will be an argument on the record regarding the basis for the motion. Unless made in open court, a motion filed in Michigan courts must be in writing, and if it raises an issue of law, it must be accompanied by a brief. MCR 2.119(A)(1), (2). The court rules also entitle an indigent defendant to free copies of court documents, including transcripts. MCR 6.433. The free transcript will be available for a defendant from which to marshal the arguments previously raised by trial counsel and any additional contentions, and there will be either a written decision or a transcribed record of the trial court's decision on the matter.

Moreover, by placing the responsibility for raising these issues on counsel for the first review of the claim, see MCR 6.005(H)(4), the Michigan system places the initial obligation on the trial counsel to identify the valid issues. Consequently, Michigan does not leave a defendant alone to identify the meritorious issues, but places this obligation initially on trial counsel.

By the nature of the plea proceeding, the possible issues that a defendant can raise as a basis on which to withdraw his plea, however, will be fewer and less complicated than the potential issues after a full trial. The *Bulger* Court explained that the nature and relative simplicity of the plea proceedings greatly reduces the possible complexity of the claims of error:

> Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the "factual basis" for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. [*Id.* at 517.]

There is no question, of course, that an appellate attorney would assist a defendant in raising these issues on appeal. But this is not the test to determine whether a defendant has an adequate opportunity to advance his arguments in the appellate system. *Ross*, *supra,* 417 U.S. at 612, 616:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system.
>
> * * *
>
> *The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.* [Citations and internal quotation marks omitted; emphasis added.]

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary. Because this distinction is based on legitimate and permissible differences between trials and guilty pleas, the Michigan appellate system is "free of unreasoned distinctions."

Id. See also *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966).[20] The sufficiency of the record available for the indigent defendant in bringing an application corresponds to the nature of the proceedings and the types of arguments that will be available to him and enables him to provide the Michigan Court of Appeals "with an adequate basis for its decision to grant or deny review" of the merits. *Ross, supra,* 417 U.S. at 615.

3. Michigan law comports with the principles underlying *Griffin*.

The Michigan system of review also satisfies the basic values that underlie *Douglas* and *Ross,* as articulated in *Griffin v. Illinois*, 351 U.S. 12 (1956). In *Griffin*, this Court examined an Illinois statute that provided an indigent with a free transcript of the trial only to raise claims of constitutional errors, but not to raise other trial errors such as the admissibility and sufficiency of the evidence. *Id.* at 15.

In his analysis for the plurality opinion, Justice Black noted that all of the States provided some method of appeal from criminal convictions "recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin, supra,* 351 U.S. at 18. Based on the significance of such a review, he determined that a system that denied "adequate review to the poor" was unequal and would allow "unjust convictions" to stand that would otherwise be set aside. *Id.* at 19. He also noted that a defendant's ability to pay had no "rational relationship to a defendant's guilt or innocence" and

---

[20] In *Rinaldi,* this Court noted the following:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

should not be a condition of obtaining a fair trial. *Id.* at 17-18. Both *Douglas* and *Ross* discussed these principles.

Applying these principles to the Michigan system of review, a defendant's ability to have his guilt or innocence reviewed is not based on his income – the State of Michigan provides an indigent defendant an attorney to represent him at trial, MCR 6.005(D), and, where the defendant pleads guilty, this appointed attorney has the responsibility to raise postconviction motions that challenge the validity of the defendant's plea and sentence. MCR 6.005(H)(4) These challenges might otherwise be barred from review. MCR 6.311(C); MCR 6.429(C).

In the concurrence in *Griffin* that comprised the fifth vote, Justice Frankfurter agreed that the Illinois statute prevented the petitioners from receiving adequate means of reviewing a possibly unfair conviction. But Justice Frankfurther also recognized that a State is empowered to make "appropriate" decisions regarding its resources in reviewing such convictions:

> But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. *The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.* [*Id.* at 24 (Frankfurther, J., concurring) (emphasis added). See also *Smith v. Robbins*, 528

> U.S. 259, 277-278 (2000), quoting Justice Frankfurter.]

The State of Michigan has drawn this balance. Significantly, for sentencing errors, Michigan recognizes that where there has been a departure from the guidelines, there is more likely to be a meritorious claim of error and the rules require the trial court to provide counsel to the indigent for the application for leave. See MCL 770.3a. For other errors related to the validity of the conviction and for sentencing errors more generally, Michigan relies on the trial counsel to raise these issues in the trial court and to create the necessary record to allow an indigent defendant to bring the application for a second, discretionary appellate review.

This Court has recognized that States have an ability to serve as "laboratories" to test solutions to novel legal problems within the limits of the Constitution. *Smith v. Robbins*, 528 U.S. at 275-276. The State of Michigan has taken this opportunity to provide one method of addressing appeals from plea-based convictions.

C. In Michigan, the review of an application to the Court of Appeals is *discretionary*.

In *Ross*, this Court provided the framework for determining whether a review on appeal was discretionary or on the merits. The definition hinged on whether the determination to grant leave was based on the correctness of the lower court's decision or on some other considerations:

> We are fortified in this conclusion [that a defendant has meaningful access to bring an application for leave] by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, *is not whether there has been "a correct*

> *adjudication of guilt" in every individual case*, but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the State," or whether the decision below is in probable conflict with a decision of the Supreme Court. The [North Carolina] Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, *since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above.* [*Id.* at 615 (citations omitted; emphasis added).]

In other words, the fact that the court may deny leave even where the lower court's decision was incorrect means that the reviewing court has discretion whether to grant leave. Given this understanding, in a discretionary appeal, a defendant does not have a right to have an erroneous decision corrected.

1. The Michigan Supreme Court in *Bulger* made clear that the review of guilty-plea convictions by the Michigan Court of Appeals is discretionary.

In Michigan, this matter was definitively resolved by the Michigan Supreme Court in examining the same basic constitutional issue as the one raised here. In *Bulger, supra,* 462 Mich. at 499,[21] that Court specifically held that the review by the Michigan Court of Appeals in examining an application for leave from a plea was *discretionary*:

---

[21] The only difference was that the Michigan Supreme Court was examining the constitutionality of the court rule that limited the circumstances in which the trial court would appoint counsel to assist in the filing an application for leave as opposed to the statute, MCL 770.3a, which is at issue here. See n. 5, *supra.*

> We hold that neither the state nor the federal constitution requires the appointment of counsel under these circumstances. Under our federalist scheme of government, Michigan remains free to decide the conditions under which appellate counsel will be provided where our *state constitution commands that the mechanism of appellate review is discretionary.* [Emphasis added.]

In the Michigan legal system, the Michigan Supreme Court is the supreme authority in defining the meaning of the court rules. See *McDougal v. Schanz,* 461 Mich. 15, 26; 597 N.W.2d 148, 154 (1999), citing the Michigan Constitution, Const. 1963, art 6, §5. Therefore, despite the standard language of the order themselves, which state that the Court of Appeals is denying "for lack of merit in the grounds presented," this review is not a decision on the merits of the underlying legal claims.

In fact, the dissenting opinion in *Bulger* frankly acknowledged that the Michigan Court of Appeals may reject leave even though the trial court's decision was "incorrect":

> Nothing in our court rules or statute preclude the Court of Appeals from denying leave even though it may believe that the trial court's decision was incorrect. Loosely defining "incorrect," such a rule might well be appropriate, because it might be uneconomical, even pointless, for the Court of Appeals to correct a trial court decision on a minor point that would not affect the final decision. Likewise, this might be the case when a court below reached a correct result for an incorrect reason. Again, barring other considerations, concerns of judicial economy might counsel against granting leave. [*Id.* at 542-543 (Cavanagh, J., dissenting).]

Consistent with this point, the court rules provide no limitations or requirements for the Michigan Court of Appeals to determine on what basis the court should or must grant leave. MCR 7.205. There is no basis on which to claim that a defendant has a right to a decision on the merits in bringing an application. These orders denying leave to appeal do not fall within the criteria for publication, MCR 7.215(B); are not precedentially binding under the rule of *stare decisis*, MCR 7.215(C); are not even within the definition of "judgments" of the Court; and are "not deemed to dispose of an appeal" for purposes of execution, enforcement, and timing of subsequent events. MCR 7.215(E)(1).

2. Other case law supports this conclusion.

The Michigan Supreme Court's holding in *Bulger* also confirmed the existing black-letter law in Michigan regarding the meaning of orders denying discretionary applications for leave to appeal. Such orders by both the Michigan Supreme Court and the Michigan Court of Appeals are not decisions on the merits of the underlying legal issues.

In *Great Lakes Realty Corp v. Peters*, 336 Mich. 325, 328-329; 57 NW 2d 901 (1953), the Michigan Supreme Court stated:

> The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed. [Citations omitted].

In *People v. Berry*, 10 Mich. App. 469, 473-474; 157 N.W. 2d 310, set aside on other grounds, 14 Mich. App. 620; 165 N.W.2d 896 (1968), the Michigan Court of Appeals relied on *Peters* and held that the Court was not barred from reviewing

the merits of an issue even though an application for leave to appeal had previously been denied:

> [D]enials of applications for leave to appeal do not import an expression of opinion on the merits of a cause, but rather are acts of judicial discretion. For this reason such denials cannot be afforded res judicata treatment. This Court is not barred from looking into the merits of the present cause. [Citations omitted; emphasis added.]

See also *State ex rel Saginaw Prosecuting Attorney v. Bobenal Invest, Inc,* 111 Mich. App. 16, 22 n 2; 314 NW 2d 512 (1981) in which the Michigan Court of Appeals held that two previous orders that denied applications for leave to appeal "for lack of merit in the grounds presented" were not adjudications on the merits.[22]

In Petitioner's brief, pp. 27-28, he cites four different sources of authority to attempt to establish that a denial of leave on a plea-based convictions is a decision on the merits and is not a discretionary appeal despite the clear holding of *Bulger*: (1) three Michigan Court of Appeals cases all involving motions to remand rather than applications for leave to appeal; (2) six unpublished Michigan Court of Appeals opinions that are not precedential under Michigan law under MCR 7.215(C)(1); (3) individual opinions by two Justices of the Michigan Supreme Court in an order denying leave to

---

[22] Defaults had been entered against two parties, and the trial court denied motions to set them aside. The parties appealed separately, and the applications for leave to appeal were denied by the Michigan Court of Appeals on April 4, 1980 (Mich. App. Docket No. 50540) and April 8, 1980 (Mich. App. Docket No. 50736). Both orders contained the form language: "IT IS FURTHER ORDERED that the application for leave to appeal be, and the same is hereby DENIED for lack of merit in the grounds presented."

appeal; and (4) a Sixth Circuit Court of Appeals habeas corpus case.[23]

Each of these cited cases from Petitioner is irrelevant to the question at hand because they do not involve a response to an application from a defendant's plea-based conviction, they are not precedential authority, and, more importantly, they do not address the Michigan Supreme Court's decision in *Bulger* that the decision to grant leave is discretionary with the Court of Appeals. These reasons require this Court to reject Petitioner's argument.

3. Petitioner's case confirms that this is discretionary review.

On appeal, Petitioner argued that OV 9 was wrongly scored in the first case where he pleaded guilty to the sexual touching of one young girl and, therefore, the Department of Corrections could not have scored this variable at 10 points for two or more victims. See MCL 777.39. Petitioner is correct.[24]

Nevertheless, this error would have had no bearing on the sentencing guidelines because Petitioner would have had a total of 35 points for his offense variables, which would still have placed him in the A-IV grid (because level IV's range is 35-to-

[23] Petitioner relies on *Abela v. Martin*, 380 F.3d 915, 923 (6th Cir. 2004) that addressed an appeal from a trial court's denial of a motion for relief from judgment under MCR 6.508(D) after an initial appeal by right to the Court of Appeals had failed. This case conflicts with an earlier decision in the Sixth Circuit on the same issue in *McKenzie v. Smith*, 326 F.3d 721, 726-727 (6th Cir. 2003), *cert denied*, 540 U.S. 1158 (2004).

[24] Under Michigan law, the Court of Appeals has held that the sentencing offense relates to the particular transaction that occurred, and the number of victims is limited to that transaction. *People v. Cheseboro*, 206 Mich. App. 468, 471-473; 522 N.W.2d 677 (1994) (scoring zero points because only "one victim involved in the criminal transaction").

49 points). See discussion at Resp. Brief in Opp. to Pet., pp 30-31. Where the error would not affect the scoring of the guideline range, Michigan law provides no relief. *People v. Houston*, 261 Mich. App. 463, 473; 683 N.W.2d 192 (2004).

In fact, this case provides an example of the point that there is no right in the court rules or law to have an error corrected in an appeal from a plea-based conviction. Because there is no right to a review on the merits, the Court of Appeals can rely on considerations that are not dependent on the validity of the trial court's decision on Petitioner's claim, but rather rely on factors outside of it to deny leave regardless whether Petitioner was right in his appellate claim. In particular, here, the Court of Appeals might have denied leave without even examining Petitioner's OV 9 claim because PRV 7 was wrongly scored in the first case in his favor.[25] Because the prosecutor did not appeal the issue, this claim would not have been before the Court. Unlike the OV 9 error, *this error would have increased the guidelines*, transforming Petitioner from an A-IV to C-IV (from 12-to-24 months to 29-to-57 months) because the PRV level would increase from A to C (10-to-24 points) for the first case. Petitioner would then have been at 29-to-57 months on each offense and, where the trial court gave all indications of sentencing at the highest end within the guidelines, Petitioner might have been facing another 33 months on his minimum. Consequently, the Michigan Court of Appeals might have

[25] The Department of Corrections neglected to score PRV 7 (concurrent conviction) at 10 points despite the fact that Petitioner pleaded guilty to two offenses at the same time. Under Michigan law, the sentencing guidelines for each offense reflect the ten points for a concurrent conviction regardless which one took place first. See MCL 777.57. The statute provides that the court is to score for concurrent convictions for each offense where the defendant "was convicted of a felony after the sentencing offense was committed." MCL 777.57(2)(a). For the first and second cases, the conviction on both cases entered concurrently and after the crimes occurred, i.e., each conviction is subsequent to each crime. The statute limits the scoring for mandatory consecutive sentencing, but these offenses were only permissively consecutive. See MCL 768.7b(2)(a).

denied leave, without reaching the merits of Petitioner's appellate claim, by relying on considerations independent of whether Petitioner was correct in his claim.

In brief, Michigan law is clear that applications for leave from plea-based convictions are discretionary appeals and a defendant does not have a right to a merits review.

D. This Court's jurisprudence since *Ross* confirms that there is no constitutional right to appellate counsel in seeking a second, discretionary review.

This Court has reaffirmed many times since *Ross* that there is no constitutional right to a second, discretionary review of the validity of a court proceeding or a court action. Likewise, there is no constitutional right to a two-review state system, or to have a different court examine a trial court's decision, or to have a second attorney identify any meritorious claims of error related to a defendant's conviction.

In *Pennsylvania v. Finley, supra,* 481 U.S. at 555, this Court examined whether appellate counsel representing a defendant in a collateral attack on the defendant's conviction had an obligation to file an *Anders* brief.[26] In concluding that there was no such obligation, this Court provided a description of the black-letter law from *Douglas* and *Ross*:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so today. Our cases establish that the right to counsel extends to the first appeal of right, and no

[26] In *Anders v. California,* 386 U.S. 738, 739, 744 (1967), this Court outlined the procedure when a court-appointed attorney saw no meritorious basis for a claim where that attorney was appointed to bring the appeal from a defendant's conviction.

> further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. [*Id.* at 555 (citations omitted).]

Significantly, this Court noted that the right to appointed counsel on appeal was limited to the "first appeal of right" and that the Constitution did not establish a right to counsel for "discretionary appeal[s] on direct review." *Id.* Applying this rule here, Petitioner has no right to appointed counsel for his discretionary appeal to the Michigan Court of Appeals.

Almost without exception, in its restating of the holding in *Douglas* and *Ross,* this Court has expressly noted that the constitutional right to appointment of appellate counsel, where the State establishes an appellate process, is for the first appeal brought "*as of right.*" E.g., *Evitts v. Lucey,* 469 U.S. 387, 394 (1985) ("This right to counsel is limited to the first appeal as of right.")[27] This Court did, however, in a plurality opinion, state that "an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court." *Murray v. Giarratano,* 492 U.S. 1, 7 (1989). But *Murray* was only examining whether *Finley* applied to a postconviction proceeding in which the defendant was facing the death penalty. This Court was not addressing the issue whether a defendant had the right to the appointment of counsel for a discretionary appeal. *Id.*

[27] See also *United States v. MacCollum,* 426 U.S. 317, 324 (1976) ("In [*Douglas*], the Court held that the State must provide counsel for an indigent on his first appeal as of right").

In *Evitts,* this Court elaborated on the distinctions between a first appeal by right and a second, discretionary application for review. In reiterating the point that the "right to counsel is limited to the first appeal of right," 469 U.S at 394, this Court's analysis confirms that the Michigan system accords with constitutional principles. In *Evitts,* this Court examined the Kentucky appellate system in which the State of Kentucky argued that the defendant had "a conditional right" to appeal. The State of Kentucky claimed that its system did not grant an appeal of right based on the argument that an appeal was subject to dismissal if the state rules were violated. But this Court noted that fallacy of this argument, quoting the Kentucky Constitution which provided that "'[in] all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court.'" *Evitts, supra,* 469 U.S. at 402. Therefore, contrary to the Michigan system, the Court there was examining an appeal by right.

More significantly, however, this Court explained that "[a] system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed." *Evitts, supra,* 469 U.S. at 399-400. The Court then noted that a criminal defendant in the Kentucky system would not have had a previous opportunity to present this claim in the appellate process and would not have any of the tools in which to advance an appeal. *Id.* at 402.

But this is the very point of the Michigan system. For that class of plea-based convictions that do not qualify for appointed counsel, the Michigan system requires that the trial counsel bring these issues before the trial court, which then sits as the first court in review of the plea's validity and sentencing claims. MCR 6.311; MCR 6.429. Consequently, unlike the Kentucky system in *Evitts,* the Michigan system ensures that the first review occurs with the assistance of counsel, MCR 6.005(H)(4), and that the indigent defendant will have the necessary tools to bring a meaningful application for leave to

appeal to the Michigan Court of Appeals where the first review in trial court is unsuccessful.

Finally, Petitioner asserts that this Court's analysis in *Coleman v. Thompson,* 501 U.S. 722, 742 (1991) made clear that the right to appointed counsel attaches even if the first appeal is by application for leave. Petitioner's brief, pp 21-22. In that federal habeas corpus case, this Court considered the question whether an attorney's error in state habeas corpus operated as a default in federal habeas, and concluded that it did not because there was no constitutional right to counsel in a state habeas action. *Coleman, supra,* 501 U.S. at 755. In reaching that conclusion, this Court analyzed the question of when the State of Virginia will extend the time in which a person can file a late state habeas, and stated in passing that the state case that held a defendant had the right to counsel from his first appeal "was required" under *Douglas. Coleman, supra,* 501 U.S. at 742. This conclusion assumed, without deciding, that such an appeal was by right. This is clear from the opinion's later reference to *Douglas,* which provides that a defendant has a right to appointed counsel in a first appeal "of right in state court." *Coleman, supra,* 501 U.S. at 755. Unlike the Virginia system, however, the application for leave to appeal in Michigan is a discretionary review. Moreover, by the scheme established in Michigan, the application is a request for a second review of the merits of a defendant's conviction and sentence.

In summary, the Michigan system has established a balance by ensuring a defendant a fair review and meaningful access to the appellate process while sensibly allocating Michigan's economic resources. See *Griffin, supra* (Frankfurter, concurring).

II. A defendant may validly waive his right to the appointment of counsel on appeal where that waiver is knowing, voluntary, and intelligent.

A. The waiver must be knowing, voluntary, and intelligent.

A waiver is the intentional relinquishment of a known right or privilege. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Regarding the right to counsel, this Court explained that the validity of a defendant's waiver is dependent on the particular facts and circumstances surrounding the waiver:

> The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. [*Johnson v. Zerbst, supra,* 304 U.S. at 464.]

Like the waiver of any constitutional right, waivers of the right to counsel "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady, supra,* 397 U.S. at 748. See also *Iowa v. Tovar,* 541 U.S. 77, __; 124 S. Ct. 1379, 1383 (2004). The waiver is sufficiently knowing where the defendant "fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v. Ruiz,* 536 U.S. 622, 629 (2002) (emphasis in original).

A defendant's ability to waive a constitutional right often serves a broader social interest. *New York v. Hill,* 528 U.S. 110, 117 (2000), citing *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275 (1942) (waiver of right to jury trial). There is a presumption that a constitutional right may be the subject

of a valid waiver. See *United States v. Mezzanatto,* 513 U.S. 196, 200-201 (1995).

This Court's analysis in *Iowa v. Tovar,* which involved an uncounseled defendant, provides a useful comparison to the ability in this case of a *counseled defendant* to make the decision to waive his right to have appellate counsel assist him in a discretionary application for leave to appeal.[28]

In *Tovar,* this Court examined the validity of a waiver by a defendant who stood before the trial court charged with a crime for which he was facing incarceration of up to a year in jail. The Iowa Supreme Court had concluded that the following admonishments were necessary to ensure that the waiver was valid:

> - The trial judge must advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked;
>
> - The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. [*Tovar, supra,* 124 S. Ct. at 1379 (formatting added; internal quotes and brackets omitted).]

This Court rejected the contention that the Sixth Amendment compelled these requirements. Rather, without any prior

---

[28] The *Iowa v. Tovar* case involved a defendant's specific Sixth Amendment right to trial counsel whereas here Petitioner is asserting a generalized Fourteenth Amendment due process and equal protection claim to appellate counsel.

assistance of counsel, the defendant elected to proceed, waiving his right to have an attorney, and pleaded guilty to the offense. He was then sentenced to serve jail time. *Tovar, supra,* 541 U.S. at __; 124 S. Ct. at 1385. This Court held that, in the particular circumstances of the case, this uncounseled waiver was valid:

> The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. [*Tovar, supra,* 124 S. Ct at 1383.]

In this way, the defendant Felipe Tovar stood convicted after his plea in the trial court without any advice from an attorney about whether there were possible defenses to the charge or whether the evidence against him might not have been admissible, i.e., whether his statement was involuntary or the results of the intoxilyzer test were unreliable.

In contrast, in this appeal, Petitioner had the trial assistance of a retained attorney for his two charged offenses. Before the sentencing that was taken on both cases on November 7, 2001, there had been at least two pretrial hearings. J.A. 1, 4. For each hearing, defendant would have conferred with his counsel at the preliminary examination, which Michigan law provides may be waived by the defendant as they were here. MCR 6.110(A). At the sentencing itself, the prosecutor placed the terms of the agreement on the record. J.A. 18. Petitioner's attorney then noted that he conferred with Petitioner regarding the substance of the plea agreement:

> That's a correct statement. This is what I have discussed with my client, Your Honor. He does understand it and we do wish to enter a plea of no

> contest to the two counts as referred to contained in these two cases.
>
> * * *
>
> With that being said, Your Honor, I believe my client does understand this agreement and is prepared to enter into the plea of no contest at this time, and we do stipulate to the reports [i.e., police reports] as referred to by the prosecutor. [J.A. 18-19.]

At this point, consistent with MCR 6.302, defendant was informed of the list of rights that he would be waiving, including "any claim of appeal as of right" and that he would have the assistance of appointed counsel in certain listed situations if he did wish to apply for leave. J.A. 22-23.[29]

In comparing *Tovar,* the right that defendant Felipe Tovar waived – his right to the assistance of counsel at trial – was significantly more important that the right Petitioner waived. Petitioner here waived his right to the assistance of appellate counsel with his "eyes open," *Tovar, supra,* 124 S. Ct. at 1387, where he pleaded guilty with the assistance of counsel, knowing what the terms of the agreement were regarding the sentencing implications of his decision to plead guilty (after at least twice previously having conferred with counsel). The only right Petitioner was forgoing, as required in Michigan for all pleas, was the right to have the assistance of appointed counsel to bring an application for discretionary leave to appeal. MCL 770.3a. And this waiver occurred at the same time that his attorney had negotiated a plea agreement the day *after* the trials were scheduled to begin. J.A. 17. In the context of the full plea proceedings, and in comparison to the right

---

[29] See argument in paragraph (B), *infra* about the point that this waiver was sufficient to waive any right defendant had to the appointment of appellate counsel.

waived in *Tovar,* the right Petitioner waived here was of relatively limited value.

Defendant Felipe Tovar waived his right to the assistance of counsel before there had been any determination of his guilt, where no attorney had examined his case, and when all the possibilities of defense were still before him. *Tovar, supra,* 124 S. Ct. at 1384-1385. He was pleading guilty to the offense as charged, with no statement of the limitations on his punishment other than the offense's statutory maximum. *Id.* In pleading guilty, defendant Tovar also waived a range of constitutional rights concerning possible claims of violations that may have occurred before the plea. *Tovar, supra,* 124 S. Ct. at 1384 (jury, presumption of innocence, right to subpoena witnesses, right to compel testimony); see also, *Tollett v. Henderson,* 411 U.S. 267, 258 (1973) (after pleading guilty, a defendant "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea"). Defendant Tovar would only be left with an opportunity to attack the voluntary and intelligent character of the plea if he wished to challenge the conviction. *Id.* In brief, defendant Tovar was waiving arguably the most important defense right – his right to the assistance of counsel – at the time that the attorney could provide the most assistance, right after he was arraigned on the charges.

In recognizing that the value of the right of the assistance of counsel that defendant Tovar waived far surpassed the value of the right that Petitioner waived, there is every reason to accord the presumption of validity to defendants waiver of a constitutional right in these particular circumstances. See *Mezzanatto, supra,* 513 U.S. at 200-201. The only relevant issue is whether, under *Iowa v. Tovar,* the waiver was knowing, intelligent, and sufficiently aware of the nature of the right and how it would apply in general even if he did not know specific detailed consequences. *Iowa v Tovar, supra,* 124 S. Ct. at

1389, citing *Ruiz, supra,* 536 U.S. at 629. Here, Petitioner's waiver met this standard.

B. The trial court's instructions were adequate to inform Petitioner of the fact that he was waiving the right to the appointment of appellate counsel in pleading guilty.

Petitioner argues that Petitioner never expressly waived his right to the assistance of appellate counsel because the trial court never told him that he would not be appointed counsel on appeal. Petitioner's brief, pp 46-47. This argument misses the clear context in which the trial court was asking these questions. After listing the rights that Petitioner was waiving, the trial court asked and Petitioner confirmed that he understood that he was giving up his claim of an "appeal as of right." J.A. 22.

The trial court then informed Petitioner of the circumstances in which the court was required to appoint him counsel and the circumstances in which the court had discretion to appoint him counsel, each time specifying that it was "under those conditions" that counsel would or could be appointed. J.A. 22-23. Significantly, Petitioner was assisted by his retained attorney at the time and he and counsel had discussed the plea and he understood it. J.A. 18-19. In context, the court's questions were clear that these were the *only* circumstances in which Petitioner would receive appointed counsel. This was a knowing waiver.

C. There is nothing unfair or unequal in including a waiver of the right to appointed appellate counsel as part of an otherwise valid guilty plea. The lower federal courts have also recognized that a defendant may validly waive his right to appeal *entirely* as a condition of his plea.

The United States Courts of Appeal have unanimously recognized that a defendant may waive his right to appeal as a part of a negotiated plea agreement. *United States v. Teeter,* 257 F.3d 14, 15-16 (1st Cir. 2001).[30] The federal rules of criminal procedure also recognize that a federal district court should instruct a defendant regarding this matter where it is a part of the plea agreement. Fed. R. Crim. Pro. 11(b)(1)(N).[31]

The courts have identified, however, certain exceptions to the waiver, where the court has authority to review the record to ensure that the waiver was knowing and voluntary, that the sentence was not illegal by exceeding the statutory maximum, that the sentence did not violate the terms of the plea

---

[30] Citing *United States v. Hernandez,* 242 F.3d 110, 113 (2nd Cir. 2001); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Cuevas-Andrade*, 232 F.3d 440, 446 (5th Cir. 2000);*United States v. Fleming*, 239 F.3d 761, 763-64 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 917 (7th Cir. 2001); *United States v. Michelsen*, 141 F.3d 867, 871 (8th Cir. 1998); *United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000); *United States v. Black*, 201 F.3d 1296, 1300 (10th Cir. 2000); and *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999).

[31] Under rule 11(b)(1), the federal rules of criminal procedure provide the following:

> During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> * * *
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

agreement, or that the plea violated some other public policy constraint. See *United States v. Black,* 201 F.3d 1296, 1300 (10th Cir. 2000); see also *United States v. Jeronimo,* No. 03-30394, 2005 U.S. App. LEXIS 3129, at *9, n 2 (9th Cir. February 23, 2005). Employing these same exceptions to the waiver of the claim to appointment of appellate counsel in these circumstances, the only relevant issue raised on appeal is the validity of the waiver. The sentencing transcript demonstrates the validity of Petitioner's waiver.

Petitioner also argues that allowing a defendant to waive any claim to the appointment of appellate counsel would undermine this Court's jurisprudence on an indigent defendant's right to be free from filing fees, *Burns v. Ohio,* 360 U.S. 252, 257-258 (1959), and from transcript costs, *Griffin, supra.* The Michigan legal system does not require a defendant to waive his right to free filings or free transcripts. They are provided for free in the Michigan system. Therefore, this issue is not implicated by the Michigan legal system and there is no need for this Court to address this hypothetical issue.

Rather, in this case, there is every reason to give effect to Petitioner's knowing waiver, given with the assistance of counsel, to any claim that he has the right to the assistance of appellate counsel to prepare his application.

CONCLUSION

For these reasons, Respondent asks this Court to affirm the denial of leave from the Michigan Supreme Court and hold that that Petitioner does not have a constitutional right to appointed appellate counsel in seeking discretionary review, and that MCL 770.3a is constitutional.

Respectfully submitted,

Michael A. Cox
Michigan Attorney General

Thomas L. Casey
Michigan Solicitor General
Counsel of Record

Bernard Eric Restuccia
Assistant Attorney General
P. O. Box 30217
Lansing, Michigan 48909
(517) 373-4875

Attorneys for Respondent

Dated: March 2005